

# Judicial “Enforcement” of a Grand Election Bargain

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## INTRODUCTION

Allow me to begin with a brief anecdote. Since beginning teaching law, I have generally invited the secretary of state to speak to my election law class each year. In one of my earliest election law classes, I invited Indiana Secretary of State Todd Rokita, now a member of Congress, to visit, and Secretary of State Rokita kindly obliged.

Secretary of State Rokita arrived at the class in the thick of major litigation over Indiana’s controversial photo identification law.<sup>2</sup> With some minor exceptions, Indiana’s law, still in effect, required persons who appeared at a polling place on Election Day to present a government-issued photo identification in order to cast an immediately countable ballot.<sup>3</sup> Secretary of State Rokita was a big supporter of the controversial law.<sup>4</sup> However, one comment he made during his presentation sparked particular interest from both myself and several students—Republicans and Democrats alike. Secretary of State Rokita said that now that photo identification was in place, the State of Indiana could begin to think about implementing Election Day registration.<sup>5</sup>

Secretary of State Rokita’s class visit occurred nearly a decade ago, but it has always remained with me. The reason is that the combination of photo identification and Election Day registration seemed to be a decent overall policy

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<sup>1</sup> © 2016. Professor of Law and Dean’s Fellow, Indiana University Robert H. McKinney School of Law. Thanks to Susan DeMaine for her typically excellent library assistance.

<sup>2</sup> See generally *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (lead opinion) (upholding Indiana’s photo identification law).

<sup>3</sup> For a full description of the details of Indiana’s law, see Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 14–21 (2009); see also Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL. 475, 481–85 (2008) [hereinafter Pitts, *Provisional Balloting*].

<sup>4</sup> John Gizzi, *Rep. Rokita: No ‘Honest Voting’ Without Photo ID*, NEWSMAX (Aug. 1, 2016, 11:08 AM), <http://www.newsmax.com/John-Gizzi/rokita-voter-id-voting-laws/2016/08/01/id/741523/>; *Indiana Secretary of State Todd Rokita Comments on the Indiana Supreme Court Decision on Photo ID Law*, INDIANAPOLIS RECORDER (July 7, 2010, 12:00 am), [http://www.indianapolisrecorder.com/aroundtown/article\\_9a58550e-35a5-5420-aa14-6580038193ad.html](http://www.indianapolisrecorder.com/aroundtown/article_9a58550e-35a5-5420-aa14-6580038193ad.html).

<sup>5</sup> In this article, I use the phrase “Election Day registration” to describe a system where voters can register and vote simultaneously on Election Day. Other commentators sometimes refer to this type of system as “same-day” registration. In general, little distinction exists between the two concepts. One slight difference occurred in North Carolina, where for a few elections voters were allowed to register and vote simultaneously during the early voting period that ended the Saturday before Election Day. See *League of Women Voters v. North Carolina*, 769 F.3d 224, 232–34 (4th Cir. 2014) (describing same-day registration and early voting in North Carolina).

prescription that would amount to a net positive impact on American election administration—increasing, at least in perception for some, if not in reality, the security of the ballot while also almost certainly increasing access for citizens who desire to participate.

Now pivot to the academic literature. As an initial matter, consider Ohio State's Dan Tokaji, who in a 2014 article written in the shadow of the Supreme Court's blockbuster decision of *Shelby County v. Holder*,<sup>6</sup> which rendered dormant Section 5 of the Voting Rights Act,<sup>7</sup> proposed a "Grand Election Bargain."<sup>8</sup> His grand bargain, discussed in more detail below, advocated a legislative compromise for election administration reform between Republicans and Democrats, where Democrats would get Election Day registration and Republicans would get photo identification.<sup>9</sup>

Professor Tokaji's proposal emanates from the legislative side of the ledger, but there's another strain of literature on the litigation side relevant to the thesis of this Article. Several articles have been written over the years, a couple of them within the last decade, arguing that advance registration requirements (e.g., a requirement that a voter register at least thirty days prior to an election) violate either the United States Constitution or some other federal law, such as the Voting Rights Act.<sup>10</sup> These articles primarily advocate for broad judicial intervention as a mechanism for imposing Election Day registration on American democracy.

This Article seeks to combine these strains of the literature to argue for a world where, at the very least, a state's adoption of a strict photo identification law, such as Indiana's photo identification law, would result in that state's advance registration requirement being declared unconstitutional by either the federal or state judiciary. In arguing for this result, this Article endorses Professor Tokaji's grand bargain as a matter of policy, but remains skeptical that such a grand bargain could ultimately be forged in Congress (or even at the state legislative level). This Article also sympathizes with those commentators who desire the judiciary to enjoin advance voter registration requirements, but views very broad judicial intervention as unlikely. Instead, this Article advocates for a more limited judicial

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<sup>6</sup> *Shelby Cty. v. Holder*, 553 U.S. 181 (2013) (holding that the Voting Rights Act provision setting forth coverage formula was unconstitutional).

<sup>7</sup> 52 U.S.C. § 10304 (2014).

<sup>8</sup> Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71 (2014) [hereinafter Tokaji, *Responding to Shelby*].

<sup>9</sup> *Id.* at 73 ("[T]his article proposes a Grand Election Bargain: federal legislation that would expand the opportunities for voter registration (a priority for Democrats) while requiring voter identification (a priority for Republicans) in federal elections.").

<sup>10</sup> See, e.g., Deborah S. James, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 YALE L.J. 1615 (1987); Pedro De Oliveira, Note, *Same Day Voter Registration: Post-Crawford Reform to Address the Growing Burdens on Lower-Income Voters*, 16 GEO. J. ON POVERTY L. & POL'Y, 345 (2009); Andrea M. Lee, Note, *Don't Save the Date: How More Restrictive State Voter Registration Deadlines Disenfranchise Minority Movers*, 43 COLUM. J.L. & SOC. PROBS. 245 (2010).

role that might ultimately serve as a way station to ultimately achieving a system of election administration that universally embraces Election Day registration.

## I. ELECTION DAY REGISTRATION: A GREAT IDEA, BUT HOW DO WE GET THERE?

This Article emanates from a simple policy premise: advance voter registration is one of the largest structural barriers<sup>11</sup> to voter participation in the United States and should be eliminated. In essence, the cost of advance voter registration—in terms of lower participation—significantly outweighs the purported benefits of advance voter registration. The first part of this section briefly makes the case for this. The question then becomes what Yale's Heather Gerken refers to as a "here to there" problem.<sup>12</sup> Once the benefits of Election Day registration are recognized from a policy perspective, how does one—particularly in an era of hyperpartisanship—achieve the desired electoral reform? Thus, the second part of this section will briefly describe several paths offered by commentators to achieve the widespread implementation of Election Day registration and why the ideas offered so far seem unlikely to work.

The basic benefit of Election Day registration is a boost in overall citizen participation. Indeed, it appears that Election Day registration is guaranteed to increase turnout.<sup>13</sup> While some dispute exists among political scientists as to *how much* turnout will increase, "[m]ost studies have found that [Election Day registration] increases turnout anywhere from three to six percentage points on

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<sup>11</sup> I use the term "structural barriers" to describe election rules and regulations that directly serve to deter citizens from casting ballots as opposed to other factors, such as bad weather on election day or dislike of the candidates in a particular election, that cause citizens not to participate. *Cf.* Tokaji, *Responding to Shelby*, *supra* note 8, at 90 (noting that "other factors unrelated to election administration can exert an equal or greater influence on participation. . . . includ[ing] the competitiveness of particular races, the type of political system in place, and of course individual motivations"). I recognize, though, that some structural barriers can have an indirect impact on participation. For instance, at least in theory, the use of single-member districts could lead to a voter disliking all the candidates in a particular contest and not showing up; in contrast, use of a proportional representation system might not lead a voter to disliking all the candidates and showing up.

<sup>12</sup> See generally HEATHER K. GERKEN, *THE DEMOCRACY INDEX* (2009).

<sup>13</sup> Jacob R. Neiheisel & Barry C. Burden, *The Impact of Election Day Registration on Voter Turnout and Election Outcomes*, 40 AM. POL. RES. 636, 638 (2012) ("In study after study using a variety of different methodologies, scholars have come to the same basic conclusion: EDR lowers the cost of voting for many Americans and increases overall turnout."); see also Benny Geys, *Explaining Voter Turnout: A Review of Aggregate-Level Research*, 25 ELECTORAL STUD. 637, 653 (2006) ("Empirical work thus strongly supports the depressing effect on turnout of tighter registration procedures."); Joshua Harder & Jon A. Krosnick, *Why Do People Vote? A Psychological Analysis of the Causes of Voter Turnout*, 64 J. SOC. ISSUES 525, 528 (2008) ("The costs of registering to vote are among the most significant reasons why Americans fail to go to the polls on election day."); Roger Larocca & John S. Klemanski, *U.S. State Election Reform and Turnout in Presidential Elections*, 11 ST. POL. & POL'Y Q. 76, 76 (2011) ("Registration has been traditionally understood as one of the most significant barriers to broader voter participation . . .");

average.”<sup>14</sup> So, we can start with the assumption that Election Day registration will result in political participation increasing by several percentage points.<sup>15</sup> Indeed, as Professor Tokaji has noted: “When it comes to election administration, voter registration is the practice most firmly established to affect turnout.”<sup>16</sup>

Of course, the important undergirding premise here is that increasing political participation amounts to a benefit. Harvard’s Alexander Keyssar has called low voter participation “the most telling symptom of the malady” of American democracy.<sup>17</sup> And, as I wrote in a previous article:

There is an almost instinctive intuition that high voter turnout is better for democracy. Indeed, it is relatively rare to hear anyone suggesting that the United States should have even lower turnout. . . . In some ways, publicly advocating for fewer voters participating would be akin to questioning the Supreme Court’s decisions that created the doctrine of one person, one vote; it is just not done without criticism that such a view lies far outside the mainstream.<sup>18</sup>

In general, higher participation means a more representative and legitimate government.<sup>19</sup> Put simply, more voter participation is typically healthier for democracy than less participation.

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<sup>14</sup> Neiheisel & Burden, *supra* note 13, at 638. Professors Neiheisel and Burden found that Election Day registration resulted in a turnout increase of about 3.3 percentage points in Wisconsin during the 1970s. *Id.* at 646.

<sup>15</sup> It’s unclear whether the widespread adoption of Election Day registration would significantly change the representativeness of the electorate (e.g., by increasing the percentage of young voters or poor voters who cast ballots). Some studies suggest Election Day registration would increase representativeness. See, e.g., Elizabeth Rigby & Melanie J. Springer, *Does Electoral Reform Increase (or Decrease) Political Equality?*, 64 POL. RES. Q. 420, 432 (2011) (“Our data does suggest, however, that [Election Day registration] has the potential to reduce participation inequality [between the rich and the poor]. [Election Day registration] is the electoral reform that demonstrated the most potential to promote equality of political participation.”); see also Craig Leonard Brians & Bernard Grofman, *Election Day Registration’s Effect on U.S. Voter Turnout*, 82 SOC. SCI. Q. 170, 177 (2001) (“By a small margin, [Election Day registration] has its greatest impact on middle class voters.”); Larocca & Klemanski, *supra* note 13, at 93 (suggesting that Election Day registration would increase turnout by younger voters); De Oliveira, *supra* note 10, at 345 (“Research shows that registration deadlines decrease voting rates more severely among lower-income Americans, in part because they have less access to registration assistance and because they are more likely to move from one residence to another.” (footnotes omitted)). Regardless of whether Election Day registration would make the electorate more representative of the voting-eligible public, there does not appear to be any evidence that Election Day registration would make the electorate *less* representative. Thus, to the extent that Election Day registration might make the electorate more representative (or at least would not make the electorate less representative), Election Day registration is unassailably positive from that perspective unless one takes the position that those who vote should not be representative of the voting-eligible population.

<sup>16</sup> Tokaji, *Responding to Shelby*, *supra* note 8, at 90.

<sup>17</sup> ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 320 (2000).

<sup>18</sup> Michael J. Pitts, *Opt-Out Voting*, 39 HOFSTRA L. REV. 897, 916–17 (2011).

<sup>19</sup> *Id.* at 917 n.84.

While I suspect most persons agree that increasing participation should be a primary goal of American election administration, a few might (perhaps privately) disagree. The most substantial objection to increased participation would be an argument that persons who register on Election Day will be uninformed (or less informed), because they did not care enough about politics and government to meet a pre-election registration deadline. George Washington University’s Spencer Overton has aptly summarized the basic position—what he calls a “merit-based vision” of democracy—as follows:

[T]he merit-based vision [of democracy] conditions the right to political participation on a citizen’s ability to comply with a particular set of criteria. A merit-based vision is individualist to the extent that an individual citizen rather than the government has a responsibility to secure or meet the conditions necessary for his or her political participation. The merit-based vision of democracy also enhances societal well-being, the argument goes, because better political decisions arise from an electorate made up of citizens who are either competent enough or care enough to meet the criteria.<sup>20</sup>

Yet even if one accepts the “merit-based” vision of democracy (and I do not!),<sup>21</sup> it’s unclear whether Election Day registration runs contrary to its goals. It seems likely that persons who register to vote on Election Day are motivated to go to the polls because they have become politically engaged by events that happened during the weeks leading up to the election.<sup>22</sup> In other words, it’s not likely a totally disinterested and uninformed voter would suddenly decide to appear at the polls on Election Day. Indeed, there is no reason to think that a person who registered

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<sup>20</sup> Spencer Overton, *A Place at the Table: Bush v. Gore Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469, 476–77 (2001) (footnotes omitted).

<sup>21</sup> As one commentator forthrightly put it, in this Article I am “unabashedly adopt[ing] an inclusive vision of democracy.” Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 WM. & MARY L. REV. 83, 101 n.73 (2012).

<sup>22</sup> See Frank Askin, *Expanding Voter Participation in New Jersey*, N.J. LAW., Feb. 2014, at 5, 6 (“Polling data shows many people fail to take an interest in elections until the last-minute avalanche of political advertising, by which time it is too late to register.”); cf. James G. Gimpel et al., *Election-Year Stimuli and the Timing of Voter Registration*, 13 PARTY POL. 351, 368 (2007) (finding that “[t]hose who registered relatively late ended up voting at higher rates. . . . [which provides] evidence that events associated with the waning months of the campaign encourage people not only to register but also to show up at the polls in November”); Harder & Krosnick, *supra* note 13, at 529 (“[I]n states with early closing dates [for registration], registration is more likely among people who are chronically interested in politics and motivated to vote and less likely among people without that chronic interest but who are inspired to want to participate in an election by campaign events or by changes in local, regional, or national conditions close to election day.”).

There might be an argument that those who register on Election Day are motivated only because of last-minute get-out-the-vote efforts of candidates or political parties. I do not think this should be of any more of a concern than those who are motivated to register *in advance* because of get-out-the-vote efforts by candidates and political parties. Moreover, I do not think it’s any worse to be motivated by the last-minute efforts of candidates or political parties than to be, say, a longtime, unflinchingly loyal voter for either the Democratic or Republican parties. The latter persons likely have only the *appearance* of being more informed. In reality, all these voters likely do is gather information from, say, Fox News or MSNBC, that already conforms to their preconceived views.

months or years before an election would be better informed or more motivated in relation to a particular election than a person registering on Election Day.<sup>23</sup>

Assuming an increase in participation is a laudable goal, a possible downside of Election Day registration is a potential for increased fraud,<sup>24</sup> but little reason exists to think that Election Day registration results in much, if any, more fraud than advance registration. The general theory of fraud in relation to Election Day registration is that it will allow voters to enter a polling place and pretend to be an eligible voter. However, a study by Rutgers' Lorraine Minnite suggests very little, if any, fraud is associated with Election Day registration.<sup>25</sup> After studying news accounts, federal prosecutions, and state prosecutions, Professor Minnite concluded that "the collective evidence suggests that there has been very little voter fraud in [Election Day registration] states."<sup>26</sup> This lack of fraud is probably because states implementing Election Day registration require persons who use that process to prove their identity and residency at the polls, and because some states use post-election audits of Election Day registrations to verify applicants.<sup>27</sup> Moreover, the advent of statewide voter registration databases makes fraud relatively easy to detect.<sup>28</sup>

Another downside of Election Day registration might be the resources necessary to implement such a system while continuing to run smooth elections (or at least ensuring elections are plagued by no more problems than under the current system).<sup>29</sup> Election Day registration could create an extra burden on poll workers that would either create chaos at the polls or necessitate more resources to prevent such chaos. For instance, instead of just checking off a voter on the registration list,

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<sup>23</sup> James, *supra* note 10, at 1632 ("The fact that an individual registered at some point in time bears no relation to the likelihood that she will cast an informed, rational ballot on election day.")

<sup>24</sup> See *Acorn v. Bysiewicz*, 413 F. Supp. 2d 119, 149–52 (D. Conn. 2005) (discussing the state interest in preventing fraud as a justification for advance registration requirements); *Ferguson v. Williams*, 343 F. Supp. 654, 656 (N.D. Miss. 1972) (recognizing state interest in an advance registration requirement as "the prevention of fraud and the securing of honest elections").

<sup>25</sup> LORRAINE MINNITE, DEMOS, A NETWORK FOR IDEAS & ACTION, ELECTION DAY REGISTRATION: A STUDY OF VOTER FRAUD ALLEGATIONS AND FINDINGS ON VOTER ROLL SECURITY 4 (2007), [http://www.demos.org/sites/default/files/publications/edr\\_fraud.pdf](http://www.demos.org/sites/default/files/publications/edr_fraud.pdf). This is not an argument that election fraud, such as absentee voting fraud, does not exist. Rather, it is an argument that the type of fraud Election Day registration might theoretically cause does not appear to exist in states with Election Day registration.

<sup>26</sup> *Id.* At one time, Connecticut allowed voters to, in essence, register on Election Day to vote for President and Vice President. Public Act 97-154, Sec. 6, 1997 Conn. Acts 347 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. § 9-236 (West, Westlaw through 2015 legislation)). A federal court noted that following the November 2000 election, there was "only one notice of possible fraud in connection with more than 30,000 presidential ballots . . . and that complaint was not substantiated." *Acorn*, 413 F. Supp. 2d at 132.

<sup>27</sup> MINNITE, *supra* note 25, at 5.

<sup>28</sup> See *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 102 A.3d 408, 411 (N.J. Super. App. Div. 2014) (describing how New Jersey's statewide voter registration system (SVRS) provides almost immediate feedback on the registration status of a voter).

<sup>29</sup> See De Oliveira, *supra* note 10, at 356 ("[O]pponents of same day registration generally argue that it . . . increases costs and administrative burdens for local election officials.").

poll workers would also have to go through the registration process with some voters. This would consume poll worker time and resources, and it could possibly overwhelm the system to deleterious effect, perhaps by, among other things, causing longer lines or creating more poll worker errors.<sup>30</sup>

But it seems unlikely that Election Day registration would overly tax the system. For starters, we’re likely talking about an increase in voter participation by only single-digit percentage points.<sup>31</sup> The system presumably should be able to handle such an increase, and if it cannot, then we should do something about that. Second, we now live in an era in which federal law requires that individuals generally not be turned away from the polling place without casting a provisional ballot.<sup>32</sup> Provisional ballots are often cast because the person who has presented him or herself at the polling place does not appear on the registration list because he or she is unregistered. Indeed, not being registered in the jurisdiction is the largest reason provisional ballots go uncounted.<sup>33</sup> Thus, Election Day registration will require poll workers to do basically the same amount of work as they do under the current provisional ballot system.<sup>34</sup> The biggest difference will be that the efforts of poll workers will not be wasted, as they will lead to a countable, instead of uncountable, ballot.

Professor Dan Tokaji agrees that the time has come for Election Day registration. As he wrote in 2014: “[L]iberalization of voter registration has the

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<sup>30</sup> *Acorn*, 413 F. Supp. 2d at 153 (noting that a state “may reasonably decide that, in order to avoid long lines, frustration, and a confusion conducive to fraud, it will not provide an incentive for its citizens to delay registration until the last minute, but will instead reduce the burden on those entrusted with seeing that lines move quickly and votes are cast legitimately by requiring citizens to finalize registration before election day”).

<sup>31</sup> See *supra* notes 13–15 and accompanying text. It’s possible the existence of Election Day registration could cause people not to register in the first place and to rely on just Election Day registration, thus increasing the number of unregistered persons who appear at the polls. This might be an unintended consequence of such a system. See *Acorn*, 413 F. Supp. 2d at 136 (“[A] side-effect of [Election Day registration] may be to encourage people who would otherwise register in advance of election day to wait and sign up at the polls.”). But it’s not clear that this has been a widespread occurrence in states that have already adopted Election Day registration. Moreover, once a person registers on Election Day, he or she will be registered for future elections. Finally, for most people it will still probably be less time consuming to, say, register ahead of time at the Department of Motor Vehicles when making changes to a driver’s license than to wait and register on Election Day.

<sup>32</sup> See 52 U.S.C. § 21082(a) (2014).

<sup>33</sup> U.S. ELECTION ASSISTANCE COMM’N, THE 2014 ELECTION ADMINISTRATION AND VOTING SURVEY COMPREHENSIVE REPORT 16 (2015) (noting that about 32 percent of provisional ballot rejections occur because the prospective voter is not registered).

<sup>34</sup> For instance, after Iowa adopted Election Day registration, “the number of provisional ballots cast fell by 67 percent”; after North Carolina adopted a system where voters could simultaneously register and vote during the early voting period, the number of provisional ballots fell by 23,000. JOSHUA FIELD ET AL., CTR. FOR AMERICAN PROGRESS, UNCOUNTED VOTES: THE RACIALLY DISCRIMINATORY EFFECTS OF PROVISIONAL BALLOTS 34 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/10/ProvisionalBallots-report.pdf>. Again, it’s possible the implementation of Election Day registration will increase the number of unregistered voters showing up at polling places. However, that increase should not be so much that poll workers will be overwhelmed. See *supra* note 31 and accompanying text.

best track record of improving participation by eligible citizens. The gold standard is same-day registration.”<sup>35</sup> The question, though, is how to get to a place where Election Day registration occurs at all elections conducted in the United States in light of the “voting wars” and hyperpolarization currently animating American politics.<sup>36</sup>

Professor Tokaji’s solution amounts to a “Grand Election Bargain that would expand voter registration opportunities, while also implementing a limited voter-identification requirement for federal elections.”<sup>37</sup> This grand bargain would be forged between Republicans, who generally oppose Election Day registration but advocate for stricter voter identification requirements, and Democrats, who generally advocate for Election Day registration but oppose stricter voter identification requirements.<sup>38</sup> In essence, each political side achieves one proposal it prefers in exchange for accepting one proposal it does not.<sup>39</sup>

While Professor Tokaji’s grand bargain is a wonderful idea and certainly something that I would wholeheartedly accept if I were a member of Congress, I think it’s unlikely to become a reality anytime soon. For starters, it’s not clear any compromise could be forged in such a hyperpartisan atmosphere. (Of course, that’s not to say it’s not worth trying; it just seems unlikely.) Indeed, proposals for Election Day registration have failed to come to fruition during several decades in a less hyperpartisan atmosphere.<sup>40</sup> Moreover, in the current hyperpartisan

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<sup>35</sup> Tokaji, *Responding to Shelby*, *supra* note 8, at 95; see also *id.* at 92 (again describing Election Day registration as “the gold standard”). Professor Tokaji also proposes a couple of other registration reforms, such as online voter registration and affirmative registration that would require the government to be more proactive in registering citizens. *Id.* at 100–01. However, Professor Tokaji makes clear that, in his opinion, Election Day registration is “[t]he most important ingredient of any reform.” *Id.* at 101.

<sup>36</sup> See generally RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012); Tokaji, *Responding to Shelby*, *supra* note 8, at 95–96 (“The great challenge to enactment of such a bill [expanding opportunities for voter registration] is the stultifying political polarization in Congress and among the public.”).

<sup>37</sup> Tokaji, *Responding to Shelby*, *supra* note 8, at 96.

<sup>38</sup> *Id.* at 101–05; see also *id.* at 107 (“A Grand Election Bargain could unite Democrats and Republicans behind a compromise package, combining the changes that each side cares about most.”). Interestingly, it’s not clear that Election Day registration would advantage Democrats. Neiheisel & Burden, *supra* note 13, at 655–56 (finding that Election Day registration may not have advantaged Democrats in Wisconsin and noting that “those who push for the adoption of EDR . . . with hopes of increasing participation among likely Democratic supporters may be surprised at the true effects of such policies as they are put into practice”); see also Brians & Grofman, *supra* note 15, at 178 (“[T]hese aggregate data yield no evidence that easier voter registration produces a Democratic or Republican electoral boon.”). On the other side of the ledger, it’s not clear that strict photo identification laws do much to actually lower turnout and boost prospects for Republicans. Michael J. Pitts, *Empirically Measuring the Impact of Photo ID Over Time and Its Impact on Women*, 48 IND. L. REV. 605, 607 (2015) [hereinafter Pitts, *Empirically Measuring Photo ID*] (noting that “Indiana’s photo identification law appears to have a relatively small (in relation to the total ballots cast) overall actual disfranchising impact on the electorate”).

<sup>39</sup> I am unaware of any reason why this grand election bargain would have an impact, either positive or negative, on any other political party (e.g., Libertarian, Green, etc.).

<sup>40</sup> See De Oliveira, *supra* note 10, at 355 (“In the 30 years since President Carter’s [1977] plan [for Election Day registration], dozens of same day registration bills have been introduced in Congress and



environment, both political parties in some ways have an incentive to continue the "voting wars" as a method of riling up their respective bases and getting out the vote.<sup>41</sup> Additionally, the bargain Professor Tokaji proposes contains a less stringent photo identification law (one that would be relatively simple to end-run) that likely would not satisfy Republicans.<sup>42</sup> In short, while Professor Tokaji's grand bargain is a great idea worthy of legislative passage, the prospects for achieving such a bargain along the lines Professor Tokaji advocates seem slim.

Professor Tokaji advocates a legislative compromise as a means of achieving a universal system of Election Day registration, but other commentators look to litigation as a means of achieving the same goal. A Note in *The Yale Law Journal* from the late 1980s contended that advance voter registration requirements could not withstand a constitutional challenge because they infringe the fundamental right to vote encapsulated in the Equal Protection Clause.<sup>43</sup> In undertaking that equal protection analysis, the Note argued that advance registration requirements were subject to strict scrutiny,<sup>44</sup> that the only compelling government interest was fraud prevention,<sup>45</sup> and that advance registration requirements were not narrowly tailored because many states were not using registration to combat voter fraud and alternative methods existed to combat fraud that were less burdensome on voters.<sup>46</sup>

A 2009 Note in the *Georgetown Journal on Poverty and Law Policy* also advocated equal protection litigation as a means for reform aimed at instituting Election Day registration.<sup>47</sup> This Note advocated using the Supreme Court's decision in *Crawford v. Marion County Election Board*<sup>48</sup> to strike down advance registration requirements under numerous conditions, advocating as-applied challenges on behalf of citizens who are homeless and economically constrained,<sup>49</sup> citizens with less access to registration assistance,<sup>50</sup> citizens who move from one

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have been similarly unsuccessful."). Of course, it's quite possible that hitching Election Day registration to photo identification might achieve a different result than previous stand-alone proposals for Election Day registration. However, one would think other bargains might have been struck during those years.

<sup>41</sup> See Michael J. Pitts, *P = E<sup>2</sup> and Other Thoughts on What Is the Value of Participation?*, 66 OKLA. L. REV. 101, 108-09 (2013) (describing the value of election administration as a campaign issue for both Democrats and Republicans).

<sup>42</sup> Professor Tokaji proposes a photo identification law that would have a so-called affidavit exception. Tokaji, *Responding to Shelby*, *supra* note 8, at 104-05. He himself acknowledges that this type of photo identification law would be less stringent than other forms. *Id.* at 104 ("Congress might use as a model the modified version of South Carolina's voter-ID law, which was ultimately precleared after being *softened* significantly." (emphasis added)); see also *id.* at 105 (describing among the "benefits" of his proposal, "the preemption of the strictest photo-ID laws, like those that have been adopted in Texas and North Carolina").

<sup>43</sup> James, *supra* note 9, at 1617-28.

<sup>44</sup> *Id.* at 1629-31.

<sup>45</sup> *Id.* at 1631-35.

<sup>46</sup> *Id.* at 1635-40.

<sup>47</sup> See generally De Oliveira, *supra* note 9.

<sup>48</sup> *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

<sup>49</sup> De Oliveira, *supra* note 9, at 362-63.

<sup>50</sup> *Id.* at 363-64. The Note appears to define those with less access to registration assistance to mainly include "those denied assistance in violation of the NVRA." See *id.* at 363.

residence to another after the voter registration deadline has passed,<sup>51</sup> and those living in states with less fraud risk.<sup>52</sup>

Finally, a 2010 Note in the *Columbia Journal of Law and Social Problems* advocated litigation using Section 2 of the Voting Rights Act.<sup>53</sup> This proposal focused on residential mobility as a cause for lack of registration and emphasized that advance voter registration requirements have a disparate impact on minority voters compared to white voters who have moved within the last 30 days of an election.<sup>54</sup> The Note then theorized that Section 2 of the Voting Rights Act, which bans election practices with discriminatory results, could be used to strike down advance registration deadlines for voters who have recently moved.<sup>55</sup>

While these litigation proposals have merit and certainly advance the dialogue in this realm, my take is that litigation leading to broad-based adoption of Election Day registration—which seems to be the primary goal of all the commentators just mentioned—seems unlikely. Federal courts seem unlikely to *broadly* strike down advance voter registration laws using the federal Constitution or the Voting Rights Act for several reasons. For starters, there is constitutional precedent in which the Court has upheld 50-day advance registration requirements.<sup>56</sup> While it's true these precedents are three decades old and contain relatively cursory and anachronistic analysis, they do provide a significant initial hurdle for a broad-based claim seeking to declare advance voter registration requirements unconstitutional and contain some very unfavorable dicta.<sup>57</sup> In addition, the Court's most recent constitutional analyses in the area of election law eschew broad pronouncements and, instead, seek to decide more narrow and particularized challenges.<sup>58</sup> Moreover, it seems even less likely that the federal courts would use Section 2 of the Voting Rights Act to enjoin the enforcement of advance registration laws. The Section 2 "results" standard has not been applied very much to election administration, and

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<sup>51</sup> *Id.* at 364–65.

<sup>52</sup> *Id.* at 361–62. The Note spends a single paragraph on this idea. *Id.* I will develop the idea more fully in Part II.

<sup>53</sup> See generally Lee, *supra* note 9.

<sup>54</sup> *Id.* at 271 (“[T]he trend is that longer registration deadlines have an overall disenfranchising effect on minorities compared to white voters who have moved within the last thirty days.”).

<sup>55</sup> *Id.* at 277–81.

<sup>56</sup> *Burns v. Fortson*, 410 U.S. 686, 687 (1973); *Marston v. Lewis*, 410 U.S. 679 (1973); see also *Rosario v. Rockefeller*, 410 U.S. 752, 754, 762 (1973) (upholding state law that required voters to declare a party affiliation eight months prior to a presidential primary and eleven months prior to a nonpresidential primary). Both *Burns* and *Marston* are per curiam opinions that are each less than seven paragraphs long, and from which three justices dissented.

<sup>57</sup> *Marston*, 410 U.S. at 680 (noting that “a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot”).

<sup>58</sup> See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200–03 (2008) (lead opinion) (rejecting a broad challenge to photo identification laws but implying more limited challenge might be successful); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (expressing preference for as applied rather than facial challenges to election laws).

considerable debate exists as to *how* Section 2 even applies in this area.<sup>59</sup> Finally, the federal judiciary seems hostile to Voting Rights Act claims in general.<sup>60</sup>

In sum, Election Day registration would be a very positive change in American election administration to increase voter participation, and its benefits outweigh the costs.<sup>61</sup> However, it seems difficult to achieve a world anytime soon where broad-based adoption of Election Day registration occurs. Legislative proposals would likely be destined for the scrapheap due to hyperpartisanship, and the federal judiciary seems unlikely to enter the election administration fray to broadly strike down advance voter registration laws. Perhaps, though, a means exists to engage either the federal judiciary or state judiciaries in a more modest role to advance the cause of Election Day registration, and the next Part of this Article explores that possibility.

## II. USING THE JUDICIARY TO "ENFORCE" A GRAND ELECTION BARGAIN

While I think broad legislative and judicial movement to implement Election Day registration remains highly unlikely, perhaps a narrower window exists for more limited judicial intervention. Essentially, what I envision is judicial "enforcement" of the grand election bargain in a particular context. This judicial enforcement would occur in circumstances where a state legislature has passed a strict voter identification law. In those limited circumstances, the federal or state judiciary should enjoin advance registration requirements and, in doing so, essentially compel the adoption of Election Day registration.

The first circumstance necessary for judicial enforcement of the grand election bargain is a state legislature adopting a strict voter identification requirement (e.g., a strict *photo* identification requirement). This has already occurred in many states and seems likely to occur in additional states as time goes on. Indeed, prior to 2005, no state had a "strict" voter identification requirement.<sup>62</sup> Since that time, more than

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<sup>59</sup> See, e.g., Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C.L. REV. 579, 595 (2013) ("[T]he legal contours of vote denial claims remain woefully undeveloped . . ."); Nicholas Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 107 ("[I]t remains quite unclear how . . . [Section 2] applies to vote denial."); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 709 (2006) ("While *Gingles* and its progeny have generated a well-established standard for vote dilution, a satisfactory test for vote denial cases under Section 2 has yet to emerge.").

<sup>60</sup> See generally Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389 (2015) (arguing that "[t]he Voting Rights Act . . . is dying . . . because the consensus over the existence and persistence of racial discrimination in voting has dissolved").

<sup>61</sup> I acknowledge there may be other proposals, such as compulsory voting, that would have an even greater impact on increasing participation. But my take is that compulsory voting is not a realistic scenario.

<sup>62</sup> See *Voter ID History*, NAT'L CONFERENCE ST. LEGISLATURES (Jan. 4, 2016), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx> ("Soon [after 2005], Georgia and Indiana pioneered a new, 'strict' form of voter ID.").

ten states have adopted a strict requirement.<sup>63</sup> And the last five years have particularly seen an explosion in the adoption of strict requirements.<sup>64</sup> Moreover, it seems likely that additional states will adopt strict requirements,<sup>65</sup> as such requirements appear to be overwhelmingly popular among the general public.<sup>66</sup>

So now let's posit that we have a situation in which a state has adopted and implemented a strict voter identification law, while still retaining an advance voter registration requirement. (Indiana is an obvious example here, with a strict photo identification law and a twenty-nine day advance voter registration requirement).<sup>67</sup> The next step will be to bring a constitutional challenge to the law, perhaps using the United States Constitution (which I will discuss next) or using a state constitutional provision (the possibility of which I will discuss after considering the federal constitution).

The doctrinal test used to judge the constitutionality of election regulations under the federal constitution is generally referred to as "*Burdick* balancing."<sup>68</sup> *Burdick* balancing is a "flexible" standard<sup>69</sup> where a court balances the magnitude of the injury to the citizen's right to vote (i.e., the burden on voters) against the government's justifications for the burden.<sup>70</sup> In its most recent application of this

<sup>63</sup> Wendy Underhill, *Voter Identification Requirements*, NAT'L CONF. ST. LEGISLATURES (Jan. 4, 2016), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx#Laws%20in%20Effect> (listing States with strict voter identification laws, most of which require photo identification).

<sup>64</sup> *Voter ID History*, *supra* note 62 ("In 2011, 2012 and 2013, the pace of adoption [of strict voter identification laws] accelerated.").

<sup>65</sup> Tokaji, *Responding to Shelby*, *supra* note 8, at 104 ("We are likely to see similar efforts to enact strict ID laws in other states with Republican dominated legislatures . . .").

<sup>66</sup> David C. Wilson, *Public Opinion on Voter ID Laws: Strong Support, Shaky Foundation*, HUFFPOST POL. (Sept. 17, 2012), [http://www.huffingtonpost.com/david-c-wilson/public-opinion-on-voter-i\\_b\\_1683873.html](http://www.huffingtonpost.com/david-c-wilson/public-opinion-on-voter-i_b_1683873.html) (showing about 80 percent support for photo identification laws). While support for such laws decreased slightly when poll participants were presented with a question framed with an argument against photo identification laws (i.e., that such laws could keep eligible persons from voting), even that question elicited about 70 percent support for photo identification laws. *Id.*

<sup>67</sup> *Voter Registration*, IND. SECRETARY ST.: ELECTION DIVISION, <http://www.in.gov/sos/elections/2403.htm> (informing the public of the 29-day advance registration requirement).

<sup>68</sup> The moniker comes from the leading case establishing the framework, *Burdick v. Takushi*, 504 U.S. 428 (1992), which involved a challenge to Hawaii's ban on write-in voting. *Id.* at 430.

<sup>69</sup> *Id.* at 434.

<sup>70</sup> As the Court wrote in *Burdick*:

A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

. . . [W]hen those [First and Fourteenth Amendment] rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

standard—in *Crawford v. Marion County Election Board*—*Burdick* balancing was described as follows:

[A] court evaluating a constitutional challenge to an election regulation [should] weigh the asserted injury to the right to vote against the "precise interests put forward by the State as justifications for the burden imposed by its rule" . . .

. . . [We have never identified] any litmus test for measuring the severity of the burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear . . . it must be justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation."<sup>71</sup>

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*Id.* at 434 (citing *Anderson v. Celebrezze*, 460 U.S.780, 789 (1983); *Tashjian v. Republican Party*, 479 U.S. 208, 213–14 (1986); *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

In *Burdick*, the Court used this balancing test to uphold Hawaii's ban on write-in voting. *Id.* at 441–42. In determining the extent of the burden the law placed on the right to vote, the Court found that sufficient avenues existed for candidates to access Hawaii's ballot. *Id.* at 434–37. For this reason, the Court found "any burden imposed by Hawaii's write-in prohibition is a very limited one." *Id.* at 437; *id.* at 438–39 ("[W]e conclude that, in light of the adequate ballot access afforded under Hawaii's election code, the State's ban on write-in voting imposes only a limited burden on voters' rights to make free choices and to associate politically through the vote.").

The Court then turned to the interests asserted by Hawaii for its ban on write-in voting. *Id.* at 439–40. The Court held that "the State's interests outweigh petitioner's limited interest in waiting until the eleventh hour to choose his preferred candidate." *Id.* at 439. The Court noted that Hawaii's interest in "avoid[ing] the possibility of unrestrained factionalism at the general election provides adequate justification for its ban on write-in voting in November." *Id.* (citations omitted) The Court also recognized Hawaii's interest in banning write-in voting at the primary stage as necessary to guard against so-called "party raiding," which the Court defined as "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election." *Id.* In sum, the Court wrote: "[T]hese legitimate interests asserted by the State are sufficient to outweigh the limited burden that the write-in voting ban imposes upon Hawaii's voters." *Id.* at 440.

<sup>71</sup> *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190–91 (2008) (lead opinion) (quoting *Anderson*, 460 U.S. at 789; *Norman*, 502 U.S. at 288–89). This statement of the basic framework appeared in Justice Stevens' lead opinion in *Crawford* and was endorsed by only three Justices. However, a dissent endorsed by two Justices essentially agreed with Justice Stevens's statement of the basic framework. See *id.* at 211 (quoting from the passage above and noting that "[t]he lead opinion does not disavow these basic principles . . . [but] does not insist enough on the hard facts that our standard of review demands") (Souter, J., dissenting).

*Crawford* involved a Fourteenth Amendment challenge to Indiana's photo identification law. *Id.* at 187. The lead opinion identified the state interests that justified the burdens Indiana's photo identification law placed on voters and potential voters as "election modernization," preventing voter fraud, and "protecting public confidence in the integrity and legitimacy of representative government." *Id.* at 192–200. After discussing the state interests in implementing a photo identification law, the Court turned to a discussion of the burdens such a law placed "on persons who are eligible to vote but do not possess a current photo identification that complies with [Indiana's law]." *Id.* at 198. The Court recognized that even though the State was giving out free photo identifications, some voters, such as the homeless and persons with religious objections, might have a "somewhat heavier burden," but that this burden was mitigated by the ability to cast a provisional ballot. *Id.* at 199.

After discussing the state interests and burdens on voters and potential voters, the Court balanced the two. *Id.* at 199–203. The Court focused on the lack of evidence in the record of the burden on voters or potential voters, including lack of sufficient evidence of the number of registered voters without valid photo identification and lack of sufficient deposition evidence of "concrete evidence of the

The premise from which this discussion commences involves a realistic perspective on *Burdick* balancing: that it can be whatever a group of judges wants it to be. *Burdick* itself was a 6–3 case. And the five judges who applied *Burdick* balancing in *Crawford* came down 3–2. As the lead opinion in *Crawford* admits, there is no “litmus test” that would neatly separate valid from invalid restrictions” so “a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the ‘hard judgment’ that our adversary system demands.”<sup>72</sup> Indeed, Justice Scalia’s concurrence in *Crawford*, in which he advocates for a different legal framework, focuses upon the lack of certainty created by the lead opinion’s description of *Burdick* balancing.<sup>73</sup> In essence, Justice Scalia described the lead opinion’s approach as an “amorphous ‘flexible standard’” as opposed to “something resembling an administrable rule.”<sup>74</sup>

So how might a court inclined to find an advance voter registration requirement unconstitutional in the context of a state election administration regime with a strict voter identification requirement proceed? Initially, a court would diminish the state interests involved. The traditional state interests recognized for advance voter registration requirements are the prevention of voter fraud and the orderly administration of polling places on Election Day.<sup>75</sup> A court seeking to diminish

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burden imposed on voters who currently lack photo identification.” *Id.* at 200–01. Ultimately, the lead opinion held that “the evidence in the record is not sufficient to support a facial attack on the validity on the entire statute.” *Id.* at 189, 200–03 (“In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters. A facial challenge must fail where a statute has a ‘plainly legitimate sweep.’ When we consider only the statute’s broad application to all Indiana voters we conclude that it ‘imposes only a limited burden on voters’ rights.’ The ‘precise interests’ advanced by the State are therefore sufficient to defeat petitioners’ facial challenge to [Indiana’s photo identification law].” (citations omitted)).

<sup>72</sup> *Id.* at 190.

<sup>73</sup> *Id.* at 204–09. (Scalia, J., concurring). Scholars have also noted that this interpretation of Justice Stevens’s *Crawford* opinion as easily manipulable is consistent with Justice Stevens’ general jurisprudential proclivities. Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PENN. L. REV. 313, 337–38 (2007) (describing Justice Stevens as not being a “fan” of a doctrinal test that requires a severe burden before applying strict scrutiny instead observing that Justice Stevens has “sometimes preferred open-ended balancing”).

<sup>74</sup> *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in judgment).

<sup>75</sup> *Burns v. Fortson*, 410 U.S. 686, 686–87 (1973) (acknowledging state interest in “the orderly, accurate, and efficient administration of state and local elections, free from fraud”); *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (“States have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voters records and protect . . . electoral processes from possible frauds.”); *Barilla v. Ervin*, 886 F.2d 1514, 1525 (9th Cir. 1989) (noting that an advance registration requirement helps further “the legitimate state goals of preventing fraud and maintaining the accuracy of the voting lists”); *Key v. Bd. of Voter Registration*, 622 F.2d 88, 90 (4th Cir. 1980) (listing fraud and preparing adequate voter records as state interests); *Acorn v. Bysiewicz*, 413 F. Supp. 2d 119, 123 (D. Conn. 2005) (recognizing that advance voter registration serves the “State’s interest in minimizing voter fraud (as well as the perception of a vulnerability to fraud) and in avoiding confusion and chaos on election day itself”); *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335 (S.D. Fla. 2008) (“[T]he registration deadline provides a certainty and reliability that enable election officials to direct

these state interests would examine, in the words of the doctrine, the "precise interests" and would recognize little evidence of fraud exists in states with Election Day registration.<sup>76</sup> More importantly, and more precisely, a court would emphasize the requirement that voters show government-issued photo identification substantially reduces the possibility of fraud by Election Day registrants.<sup>77</sup> And beyond requiring a photo identification, itself probably a sufficient barrier to fraud, there are other simple steps a state can take to reduce fraud.<sup>78</sup>

A court would also examine the "precise interest" of the state in running an orderly election. A court might note that no evidence supports the idea that states with Election Day registration have more chaos and problems at their polling places than states without Election Day registration.<sup>79</sup> Moreover, a court might note that with the widespread use of provisional ballots for voters who arrive at the polling place but who do not appear on the voter registration list, any additional work created by a system of Election Day registration is not as much as it seems at first blush.<sup>80</sup>

After diminishing the state interests in an advance voter registration requirement, a court might then proceed to emphasize the severity of the burden. In doing so, a Court might note that advance voter registration reduces overall turnout by several percentage points and that Election Day registration would likely lead to thousands of additional voters. Take Indiana as an example. If turnout increased by just three percentage points (and three percentage points is on the low end of the estimated increase in Election Day registration)<sup>81</sup> at the 2012 general election, nearly 80,000 additional votes would have been cast.<sup>82</sup> As such, advance voter registration amounts to a burden on the entire electorate.

A court might also play up the severity of the burden on specific categories of voters. For instance, lack of Election Day registration disfranchises voters who properly registered to vote, but whose registrations are botched by governmental officials in some way (e.g., by a mistake in data entry).<sup>83</sup> It disfranchises voters who

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their efforts to the essential tasks of election preparation and thus minimizes the degree of disorder and the risk of error or even chaos.").

<sup>76</sup> See *supra* notes 24–27 and accompanying text.

<sup>77</sup> In essence, to commit voter fraud in the context of a photo identification requirement, the person presenting his or herself at the polling place would probably need to create fake photo identification.

<sup>78</sup> In addition to showing government-issued photo identification, a condition of registration on Election Day might be to take a picture of the registrant. A state can also inform registrants of the penalty for voter fraud and inform them that a follow up of Election Day registrations is performed to ensure the integrity of the ballot.

<sup>79</sup> See *supra* notes 29–30 and accompanying text.

<sup>80</sup> See *supra* notes 32–34 and accompanying text.

<sup>81</sup> See *supra* notes 13–15 and accompanying text.

<sup>82</sup> At the 2012 general election in Indiana, 2,663,368 persons cast ballots. *General Election Turnout and Registration*, IND. SECRETARY ST.: ELECTION DIVISION, [http://www.in.gov/sos/elections/files/2012\\_General\\_Election\\_Turnout\\_Report.pdf](http://www.in.gov/sos/elections/files/2012_General_Election_Turnout_Report.pdf) (last visited Sept. 3, 2016).

<sup>83</sup> See, e.g., Complaint at ¶ 41, *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 102 A.3d 408, 415 (N.J. Super. Ct. App. Div. 2014) (alleging the failure of county officials to

change their residence close to the date of an election and who do not have the time to update their registration. It disfranchises persons who get motivated to vote during the last days of a campaign when information about the election is at its pinnacle.<sup>84</sup> It disfranchises persons who become citizens just before the election, and in some states ex-felons who become eligible between the deadline for registration and Election Day.<sup>85</sup> And it may disproportionately disfranchise other groups as well.<sup>86</sup>

After downplaying the state interests and emphasizing the burden on the electorate, a court could then balance the two and conclude that advance voter registration requirements violate the United States Constitution.<sup>87</sup>

But the possibilities here are not limited to federal constitutional challenges. Indeed, there may not be much federal judicial will to “enforce” the grand bargain, but there is an alternative. The University of Kentucky’s Josh Douglas has recognized that “[v]irtually every state constitution confers the right to vote to its citizens in explicit terms.”<sup>88</sup> While Professor Douglas recognizes that state courts have “largely underenforced the right to vote because they have too closely followed federal courts voting-rights jurisprudence,”<sup>89</sup> he also recognizes that it is still possible that state courts could give “independent force to their explicit provisions conferring the constitutional right to vote.”<sup>90</sup>

For instance, a 2014 decision from a New Jersey appellate court is instructive as to the potential salience of state law challenges to advance voter registration requirements. A group of plaintiffs challenged New Jersey’s twenty-one day advance registration requirement as a violation of the New Jersey Constitution.<sup>91</sup> The trial court granted summary judgment to the defendants on the ground that

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process registration applications that had been timely filed), <https://law.newark.rutgers.edu/files/u/DRAFTFINAL329EDRConLitSuit.pdf>.

<sup>84</sup> Sources cited *supra* note 22.

<sup>85</sup> See, e.g., IND. CODE ANN. §§ 3-7-13-4 to -6 (West, Westlaw through 2016 Second Reg. Sess.) (stating that a felon becomes eligible to vote upon leaving jail, meaning if a person leaves jail before the election but after the 29-day advance registration requirement, they are ineligible to vote).

<sup>86</sup> See *supra* text accompanying note 15.

<sup>87</sup> *But cf. Diaz v. Cobb*, 541 F. Supp. 3d 1319, 1334–35 (S.D. Fla. 2008) (finding the burden of advance registration on voters to be slight, and downplaying the burden by noting “the year-round nature of voter registration, the liberal availability of voter registration applications, the assistance that election officials offer to applicants and third-party groups, the numerous means of submitting completed applications, and the requirement of prompt notice to applicants who submit incomplete applications refute any suggestion that the registration deadline burdens the ability of Floridians to register to vote”). See *Rutgers Univ. Student Assembly*, 102 A.3d at 415 (overturning decision granting summary judgment for county board of election and commissioner of registration, and noting that a judge is required to balance even a “minimal” burden on voting rights against the state’s interests).

<sup>88</sup> Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 91 (2014).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 94.

<sup>91</sup> Complaint at ¶¶ 2, 4–5, *Rutgers Univ. Student Assembly*, 102 A.3d at 408 (No. A-2383-13T3), <https://law.newark.rutgers.edu/files/u/DRAFTFINAL329EDRConLitSuit.pdf>.



the burden of registering was not severe.<sup>92</sup> However, the appellate court reversed, implying that the trial court inadequately considered the evidence of voter registration as a burden,<sup>93</sup> and expressly held that the judge did not make any findings as to whether the state’s purported justifications outweighed the burden imposed on the right to vote.<sup>94</sup> In essence, the message from the New Jersey appellate court was that claims arguing that advance voter registration violates the New Jersey Constitution should be taken very seriously,<sup>95</sup> illustrating that state constitutions may provide another potentially fertile ground for the judicial enforcement of a grand election bargain.<sup>96</sup>

Of course, my proposal here is not without potential downsides. One possible objection would be that, instead of compelling the adoption of Election Day registration, federal and state judiciaries should just strike down strict voter identification laws.<sup>97</sup> Indeed, while *Crawford* makes it seem unlikely that the federal judiciary will engage in the *broad-based* dismantling of strict voter identification laws, other types of federal law challenges to strict voter identification laws are starting to meet with some, albeit mixed, success.<sup>98</sup> And state courts have

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<sup>92</sup> See *Rutgers Univ. Student Assembly*, 102 A.3d at 415 (“The judge found ‘the burden to register, if any, to be minimal.’”) (quoting the trial court opinion).

<sup>93</sup> *Id.* (“The judge did not address any of the evidence plaintiffs presented on this issue [of the burden to register] and, instead, simply found that because college students are familiar with the need to meet deadlines for registering for classes, it was not onerous to require them to meet similar deadlines to register to vote before an election.”).

<sup>94</sup> *Id.* (“[T]he judge made no findings as to whether this stated purpose was advanced by the twenty-one-day advance registration requirement or whether there was any evidence in the record to support defendants’ claim that this requirement was necessary to prevent voter fraud.”); *Id.* at 416 (“The judge also failed to explain why defendants’ interest in the advance registration requirement outweighed the burden imposed on plaintiffs’ right to vote. Therefore, we are unable to fulfill our appellate function.”).

<sup>95</sup> See generally *id.* at 415 (applying the *Burdick* balancing test but stating, “[f]or purposes of this appeal, we assume, *without ruling*, that the application of this [*Burdick* balancing] test was proper [under the New Jersey Constitution].”) (emphasis added).

In a later decision that was handed down while this Article underwent editing, the New Jersey appellate court upheld the district court’s rejection of the challenge on remand. *Rutgers Univ. Student Assembly v. Middlesex Cty Bd. of Elections*, 141 A.3d 33d (N.J. Super. Ct. App. Div. 2016).

<sup>96</sup> While I have called this judicial “enforcement” of a grand election bargain, I have put “enforcement” in quotes because the reality is that the judiciary is not really enforcing a bargain. No judge is ever going to come out in an opinion and explicitly adopt the premise of this proposal. Instead, what judges do is what all human beings do when they have a decision with information that legitimately allows them to decide an issue in either direction, they decide what they want the decision to be and then they fit the facts to justify the direction that they decide. My hope is that this article would spur judges to think in this way.

<sup>97</sup> See *supra* text accompanying notes 55–59 (explaining that I do not think the judiciary is going to engage in broad-based rejection of advance voter registration requirements).

<sup>98</sup> Compare *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (reversing district court decision holding that Wisconsin’s photo identification law violates Section 2), with *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc) (upholding district court decision holding that Texas’s photo identification law violates Section 2).

been a bit more inclined to use state constitutions to strike down strict voter identification laws.<sup>99</sup>

But instead, I would argue that courts would be better off striking down advance voter registration requirements for several reasons. First, it would appear that the greatest overall benefit to the system of election administration would not come from simply striking down strict photo identification laws. Rather, the greatest overall benefit would come from striking down advance registration requirements. As detailed earlier, the lower-band estimate of the increase in turnout created by Election Day registration is three percentage points.<sup>100</sup> In contrast, the number of persons that a strict voter identification law would actually prevent from voting is likely lower.<sup>101</sup>

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<sup>99</sup> See *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2014 WL 184988, at \*24 (Pa. Commw. Ct. 2014) (using Pennsylvania constitution to strike down photo identification law); see also *Martin v. Kohls*, 444 S.W.3d 844, 852 (Ark. 2014) (using Arkansas constitution to strike down photo identification law); *Weinschenk v. State*, 203 S.W.3d 201, 219 (Mo. 2006) (using Missouri constitution to strike down photo identification law).

<sup>100</sup> See *supra* notes 13–15 and accompanying text.

<sup>101</sup> I have authored or co-authored a series of articles analyzing the number of persons who arrived at Indiana's polls without valid voter identification during presidential years and who voted a provisional ballot due to their lack of identification. In each of those elections, only a very small percentage of the overall electorate appear to actually have been prevented from casting a countable ballot due to lack of voter identification. See Pitts, *Empirically Measuring Photo ID*, *supra* note 38, at 613 (finding that the number of provisional ballots cast due to a lack of identification amounted to only 0.026% of total ballots cast at Indiana's 2012 general election); Michael J. Pitts, *Photo ID, Provisional Balloting, and Indiana's 2012 Primary Election*, 47 U. RICH. L. REV. 939, 951 (2013) (finding that the number of provisional ballots cast due to a lack of identification amounted to only 0.012% of total ballots cast at Indiana's 2012 primary election); Pitts, *Provisional Balloting*, *supra* note 3, at 499–500 (estimating that the number of provisional ballots not counted due to a lack of photo identification amounted to only 0.019% of total ballots cast at Indiana's 2008 primary election); Michael J. Pitts & Matthew D. Neumann, *Documenting Disfranchisement: Voter Identification During Indiana's 2008 General Election*, 25 J.L. & POL. 329, 340 (2009) (finding that the number of provisional ballots cast due to a lack of identification amounted to only 0.037% of total ballots cast at Indiana's 2008 general election).

Of course, such studies do not account for persons who do not show up at the polls because they know they lack qualifying voter identification. However, somewhat counter-intuitively, at least one study suggests that knowledge of photo identification laws actually increases turnout. See Jack Citrin et al., *The Effects of Voter ID Notification on Voter Turnout: Results from a Large-Scale Field Experiment*, 13 ELECTION L.J. 228, 235–38 (2014) (finding “little support for the hypothesis that notification of ID requirements depresses turnout” and that “experimental results suggest that notifications about voter identification requirements may increase turnout”).

That said, a 2015 report provides some evidence that strict voter identification laws may have more of a chilling impact on turnout than previously thought. In this very important study, researchers analyzed the impact of implementing a photo identification law in a congressional district in Texas. See generally BILL HOBBY ET. AL., HOBBY CTR. FOR PUB. POLICY, THE TEXAS VOTER ID LAW AND THE 2014 ELECTION: A STUDY OF TEXAS'S 23RD CONGRESSIONAL DISTRICT 1 (2015), [http://www.uh.edu/class/hcpp/\\_docs/voteridcd23.pdf](http://www.uh.edu/class/hcpp/_docs/voteridcd23.pdf). A survey of registered voters who did not turn out indicated that 5.8 percent of those persons did not cast a ballot primarily because they did not have valid identification. *Id.* Interestingly, though, follow-up questioning indicated that only very few of these persons, 0.5 percent, actually did not possess a valid identification. *Id.* In other words, the vast majority of persons who indicated lack of identification was their primary reason for not voting actually had an identification that would have allowed them to cast a ballot. Thus, if strict photo identification

Another reason it might be better for judges to strike down advance voter registration requirements, rather than strict voter identification laws, would be public opinion. Strict voter identification laws appear to be popular with the vast majority of the electorate.<sup>102</sup> And decisions striking down strict voter identification laws, particularly from elected state court judges, will put the judiciary at odds with public opinion. Conversely, it would seem that Election Day registration is not overwhelmingly unpopular with the electorate—indeed, a majority may favor it.<sup>103</sup> And while some like to think that judges pay no heed to politics and public opinion, in reality judges always operate in the shadow of public opinion.

The last reason is that the state judiciary striking down advance voter registration requirements builds momentum for a day when the federal judiciary broadly strikes down advance voter registration requirements. University of California–Davis’s Chris Elmendorf has noted that one method the Supreme Court employs in striking down election regulations is to look at the “larger legal landscape.”<sup>104</sup> In essence, a court is more inclined to strike down an election regulation if a particular election law is “an outlier relative to the limits employed in other states.”<sup>105</sup> In this way, if state courts strike down advance registration requirements (coupled perhaps with additional states abandoning them through legislation), an underlying dynamic may occur leading to broad federal judicial intervention over the long haul.

Finally, let me admit that my proposal may be just as unduly optimistic as other commentators. However, it does have a few things potentially going for it. First, it doesn’t rely on a federal legislative compromise in an era of hyperpartisanship. Second, it doesn’t rely exclusively on federal judicial intervention. Instead, it also provides potential for state judicial intervention. Third, while the proposal relies on judicial intervention, it relies on relatively narrow judicial intervention in a very

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requirements actually keep about 6 percent of registered voters from coming to the polls and only increases overall turnout by less than that, then perhaps the grand election bargain is a bad idea.

There are reasons, though, to think that the grand election bargain is still a net positive on turnout. First, the study only covers one congressional district in Texas at a single election and more study is necessary to determine whether these numbers are replicable. More importantly, the number of persons who do not vote because they lack identification and *who actually lack valid identification* is quite small (0.5 percent of non-voters). This means that an education program might reduce the number of persons failing to turnout because of a perceived lack of voter identification. *Id.* at 8 (suggesting that “a well-designed and well-funded public voter education campaign which clearly explains the forms of photo identification that can be used by Texas registered voters to cast a ballot in person could go a long way toward ameliorating most of the adverse impact of the state’s voter photo ID law on voter turnout”). In the alternative, it could also mean that voters claiming to not vote because of a lack of identification were not giving truthful answers to the surveyors.

<sup>102</sup> See Wilson, *supra* note 66 (presenting data on the popularity of photo identification laws).

<sup>103</sup> Ariel Edwards-Levy, *Most Americans Want Their State to Make Registration Easier*, HUFFINGTON POST (Mar. 30, 2015), [http://www.huffingtonpost.com/2015/03/30/voter-registration-poll\\_n\\_6970896.html](http://www.huffingtonpost.com/2015/03/30/voter-registration-poll_n_6970896.html) (citing poll showing 55 percent support for Election Day registration).

<sup>104</sup> Elmendorf, *supra* note 73, at 357.

<sup>105</sup> *Id.* at 361.

specific context—instances where States have adopted strict voter identification laws.<sup>106</sup>

### CONCLUSION

The argument here is that in the limited circumstances where a state has enacted a strict voter identification law, federal or state courts should compel the adoption of Election Day registration. Overall, such a system of election administration would represent an improvement for American democracy. Of course, it would be wonderful if Congress would pass such a law for federal elections. It would also be wonderful if the federal judiciary would enjoin the use of advance registration requirements more broadly. But the latter two events seem unlikely.

In advocating that Election Day registration be mandated by the judiciary in limited circumstances, I am perhaps too hopeful that the judiciary will start taking a stand in relation to how our elections are structured. While I am deeply skeptical that courts alone can solve all that ails American democracy, it seems like the judiciary has largely abandoned any kind of supervisory role over the self-interested politicians; letting the partisans run wild in structuring the rules of the electoral game amounts to an abandonment of judicial responsibility. And while I am hopeful for at least some limited judicial role, even that limited role may be difficult to achieve.

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<sup>106</sup> One point to tangentially consider is whether courts should enforce the grand bargain in reverse (i.e., in situations where a state legislature passes Election Day registration without a strict voter identification requirement). While I don't think this would be much of a problem in terms of policy, it likely involves too great a stretch of constitutional voting rights for a court to go in this direction. The problem here is that the lack of a photo identification requirement does not constitute a burden on voters, as the absence of a photo identification requirement would not seem to prevent anyone from casting a countable ballot. I suppose one could plausibly argue that not requiring a photo identification amounts to a burden on voters because fraud might be committed that "dilutes" legitimate votes. *Cf.* *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."). But such an argument would seem to be quite a stretch under current doctrine.